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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PROFESSIONAL CABIN CREW ASSOCIATION,
GLENDA LOPEZ-BRUNER, and
DELYNN KLOSTERHOFF,
Petitioners,

v.

NATIONAL MEDIATION BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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" 'There could be no clearer abridgement of . . . the right [of employees] to bargain collectively through representatives of their own choosing . . .' than to grant 'exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority.' " *NLRB v. Local Union No. 103 (Bridge Workers)*, 434 U.S. 335, 344 (1978), quoting *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961). Yet a substantial nonconsenting majority of TWA's flight attendants have been subjugated to the wishes of as few as 12% of the work force

since 1986,[1] and the lower courts have found no violation of the Railway Labor Act "gross" enough to create jurisdiction under the doctrine they have created from *Switchmen's Union v. NMB*, 320 U.S. 297 (1943).

"The majority-rule concept is today unquestionably at the center of our federal labor policy." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), quoting Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J. 1327, 1333 (1958). As this Court also stated in *Allis-Chalmers*:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."

388 U.S. at 180.[2] "Freedom of choice in the selection of representatives . . . is the essential foundation of the statutory scheme." *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569 (1930).

The Acting Solicitor General's Brief for the Federal Respondent in Opposition ("Br. Opp.") does not justify the NMB's denial to TWA's flight attendants of their fundamental right to select their representative, and its suggestion (Br. Opp. 16 n.9) that they start anew to collect authorization cards and try again at the National

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[1] See PCCA's Petition for a Writ of Certiorari ("Cert. Pet.") 6-7.

[2] This Reply relies on cases interpreting the majority rule principle in both the Railway Labor Act and the National Labor Relations Act. The right is explicit in both, see RLA § 2, Fourth (45 U.S.C. § 152, Fourth) and NLRA § 7 (29 U.S.C. § 157), and this Court has held that the sections establish equivalent rules. *See, e.g., Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 199-201 (1944); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

Mediation Board gives no assurance of any different result. All the Brief really does is explain how the doctrine of *Switchmen's Union* lets a denial of majority rule happen:

- On December 15, 1986, and again on July 30, 1987, PCCA submitted NMB forms requesting the investigation of a representation dispute, supported by authorization cards from a substantial majority of TWA's flight attendant work force.[3] Those submissions were seven months and fourteen months, respectively, after a strike had substantially changed the composition of the force. The incumbent union had become a minority union, and it was suing TWA to have most of the new force ousted. Cert. Pet. 3.
- The NMB finally acted eighteen months after the strike had ended by denying an election.[4] The NMB used a presumption that all replaced flight attendants were still "employees" of TWA for purposes of union voting,[5] due to IFFA's litigation to oust the new force.[6] Then the NMB took no inves-

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[3] The NMB's implication that PCCA did not submit cards from a majority of flight attendants until July 30, 1987 (Br. Opp. 3-4) is incorrect. See Cert. Pet. 3-4. The July submission was required because of the seven months taken by the NMB in dealing with the earlier submission.

[4] The NMB did not meet its 30-day deadline under the RLA, as its brief implies. Br. Opp. 14-15. PCCA's election was denied eleven months after its first submission of cards and four and one-half months after the second submission.

[5] The NMB is also incorrect in stating that its representative arrived at the presumption "[a]fter conducting his investigation." Br. Opp. 4. The NMB's representative announced that presumption before starting.

[6] The NMB's presumption has one direct and predictable effect—a minority union like IFFA can freeze its incumbency for as long as it can litigate, which was three years in this case. Br. Opp. 3. However, even eighteen months after the end of the strike, when PCCA's election was denied, the former workers had long since ceased to have "a commonality of circumstances" with the actual

tigative step that could have led to current information on the circumstances of the replaced workers.

- The minority union is still recognized.
- The lower courts took their "peek at the merits," saw no "gross violation" of the RLA to create jurisdiction under the *Switchmen's Union* doctrine, and did nothing to restore majority rule to TWA's flight attendants.

The Acting Solicitor General now states that the law has worked well in this case and has "produced no untoward consequences in the administration of the Railway Labor Act." Br. Opp. 11.

To the contrary, it has produced a continuing denial of an election to a majority of the TWA flight attendants. If such abridgement of a fundamental right and such an attitude toward it are what forty-six years of *Switchmen's Union* have led to, then surely that case should be revisited by this Court.

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workers to justify being part of the same bargaining unit, because of "distinctively different interests." *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975).

The NLRA cuts off former-striker voting at one year, 29 U.S.C. § 159(c)(3), and there is no justification for a broader rule under the RLA. "[T]he major purpose of Congress in passing the Railway Labor Act was to 'provide a machinery to prevent strikes,'" *Texas & N.O. R.R.*, 281 U.S. at 565 (citation omitted), but the NMB's broad rule fosters them. The Solicitor General has acknowledged the more limited right of RLA employees to strike: "because of the differing nature of the industries regulated by the two statutes and the different historical and legal contexts in which the two statutes were enacted, Congress apparently placed greater restrictions on the right of employees to resort to economic weaponry, *including the strike*, in the RLA than it did in the NLRA," Cert. Pet. 13-14 (quoting brief for the NLRB as *amicus curiae* in *TWA v. IFFA*, 109 S. Ct. 1225 (1989) (emphasis added)), and his Office cannot now so easily avoid the truth of that statement. Br. Opp. 12 n.5.

On numerous occasions, this Court has protected majority rule from encroachment by both unions and employers:

> "[A] union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit.
>
> * * * *
>
> "The Court has held that both union and employer commit unfair practices when they sign a collective bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests."

Local Union No. 103 (Bridge Workers), 434 U.S. at 344. "[C]ollective action would be a mockery if representation were made futile by interferences with freedom of choice," *Texas & N.O. R.R.*, 281 U.S. at 570, and the standard for private parties is so strict that good faith is not a defense. *Garment Workers'*, 366 U.S. at 738-739 ("To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives").

However, the *Switchmen's Union* doctrine condones carelessness in the lower courts. Cert. Pet. 15-16. The doctrine comports with no modern reading of the Railway Labor Act (Cert. Pet. 9-12), and it is not supported by this Court's opinions in *Switchmen's Union* or *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965). Those cases involved NMB "class or craft" decisions uniquely within the technical expertise of the NMB, not a fundamental principle of labor law like majority rule. Cert. Pet. 17. This Court stated in *TWA v. IFFA*, 109 S. Ct.

1225, 1234 (1989), that jurisdiction to review NMB decisions does exist to enforce "statutory commands which Congress had written into the Railway Labor Act" where "the scheme of the Railway Labor Act could not begin to work without judicial involvement." The lower courts should be instructed that their interpretation of *Switchmen's Union* is in conflict with that standard. Cert. Pet. 18-19.

The plain fact is that the doctrine has disserved the purpose of the RLA in this case. "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937). In passing the Railway Labor Act, "Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife." *Texas & N.O. R.R.*, 281 U.S. at 570. See *Emporium Capwell*, 420 U.S. at 62 (collective bargaining is "an instrument of the national labor policy of minimizing industrial strife"); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining").

There has not been collective bargaining between IFFA (the minority union) and TWA in the three and one-half years since the end of the 1986 strike—the predictable outcome of the NMB's denial of majority rule and the lower courts' inaction. "[T]he balance of bargaining advantage [is] to be set by economic power realities," *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 288 (1972), but the economic power reality at TWA is that IFFA does not represent a majority of the work force, and both TWA and that union

know it. As this Court recognized in *Landers v. NLRB*, 108 S. Ct. 1440, 1443 (1988), a minority union may well be motivated not to pursue reasonable agreement with the employer. In fact, collective bargaining between TWA and the minority union would likely be ill-fated. "Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." *Burns*, 406 U.S. at 288.

The lesson here is that the *Switchmen's Union* doctrine has shielded an NMB decision that has had no other effect than to frustrate majority rule and collective bargaining by allowing a minority union to freeze its incumbency by pursuing years of unsuccessful litigation. That result is directly contrary to what the *Switchmen's Union* Court intended: that representation disputes be resolved promptly. The NMB should not have the *Switchmen's Union* doctrine of the lower courts to hide behind, and the lower courts need to be instructed that they must exercise jurisdiction over NMB decisions in conformity with *TWA v. IFFA*.

The writ of certiorari should issue.

Respectfully submitted,

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